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# Outlook for Copyright and Digital Media Legislation in the 108th Congress

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# OUTLOOK FOR COPYRIGHT AND DIGITAL MEDIA LEGISLATION IN THE 108TH CONGRESS

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## I. OVERVIEW AND MAIN POINTS

The 108th Congress will be confronted by the same copyright controversies and related legislative initiatives that occupied attention and debate in the 107th Congress. Continued gridlock is the most likely short-term, first session scenario as competing interest groups intensify their lobbying, Congressional Committees engage in jurisdictional "turf" disputes, and various lawsuits wind their ways through the courts. Significant legislation becomes more plausible in the second (2004) session, and the required reauthorization of the Satellite Home Viewer Act[1] by the end of that year may provide a vehicle suitable to be "Christmas treed" with a variety of copyright amendments. Whereas

Hollywood's close identification with the Democratic Party.[2] However, the main cause will be the growing alliance between technology, telecommunications and consumer electronics firms with cyber-liberties, consumer, and privacy public interest groups, motivated by a shared reaction to Hollywood's aggressive legislative and litigation assault on digital technologies charged with abetting "piracy."

Major points of this memo include:

- Congressional leadership changes will alter the environment for consideration of digital copyright legislation;
- Proposals to delineate acceptable "fair use" for digital media will continue to be countered by a push for anti-copying technology mandates and legalization of broad "self-help" measures against P2P networks; and
- The outcomes of ongoing lawsuits may spur Congressional reaction.

In the end, significant copyright legislation will emerge from the 108th Congress only if sufficiently powerful consensus develops for a response to the unforeseen technological changes that have occurred, and legal questions that have arisen, since the last major legislative round in 1998.

## II. LEGISLATIVE INITIATIVES

### A. *Key Committee Leadership*

Significant changes in the leadership of Congressional Committees dealing with copyright and related technology legislation have occurred with the start of the 108th Congress.

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[2] *Hotline Extra/Hollywood Auditions*, NATIONAL JOURNAL, Feb. 15, 2003. Hollywood is the fourth largest source of cash in Federal elections, and contributions from the entertainment industry have more than tripled in the last three election cycles, to $46 million in 2002. Over the past decade more than 70 percent of this Hollywood financial support has gone to Democrats.

On the House side, James Sensenbrenner remains Chairman of the Judiciary Committee but the Chairman slot at the Subcommittee on Courts, the Internet and Intellectual Property shifts from Howard Coble (R-NC) to Lamar Smith (R-TX). Rep. Smith was a cosponsor of Rep, Howard Berman's (D-CA) P2P bill (discussed below); Rep. Berman retains the ranking minority member slot on the Subcommittee. While the Subcommittee's full agenda has not yet been announced, Rep. Smith recently said, "I'm very mindful of artists and creators and musicians and their interests. The issue of piracy is so important to me that one of the first hearings, if not the first, will be on piracy."[3]

At the Energy and Commerce Committee, Rep. "Billy" Tauzin (R-LA) retains the Chairman's slot while Rep. Fred Upton (R-MI) continues to Chair the Subcommittee on Telecommunications and the Internet. Rep. Upton was a primary cosponsor and instrumental in the passage of legislation[4] establishing a ".kids" domain name from which content unsuitable for minors age 13 and under would be barred.

At the Senate, the Chairman slot at the Judiciary Committee passes back to Sen. Orrin Hatch (R-UT). In the past, he and ranking minority member Sen. Patrick Leahy (D-VT) have worked cooperatively on copyright issues, dating back to the 1998 passage of the Digital Millennium Copyright Act (DMCA) and prior. Hatch takes pride in his musical composing and brings first hand knowledge of and empathy for the artist's perspective to these issues, while Leahy likes to use and experiment with new digital technologies. Copyright matters are handled at the full Committee level.

A more significant shift occurred at the Senate Commerce Committee, where the Chairman's duties passed back to Sen. John McCain (R-AZ) from Senator Ernest Hollings (D-SC). Senator McCain did not support Sen. Hollings' copy control initiative (discussed below). Meanwhile, Sen. Sam Brownback has

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[3] *Smith Promises Piracy Hearings*, BILLBOARD, Feb. 15, 2003. The Subcommittee subsequently scheduled a hearing on "Peer-to-Peer Piracy on University Campuses" for February 26, 2003.

[4] H.R. Res. 3833, 107th Cong. (2002) (enacted).

succeeded to the Chair at its Subcommittee on Science, Technology and Space, and has vowed to introduce legislation barring the Federal Communications Commission (FCC) from taking any regulatory action to require the "broadcast flag" sought by Hollywood interests for over-the-air digital broadcasts, as well as to study "potential reforms to the DMCA to ensure that this fundamental balance [between copyright owners and the goal of copyright, namely, the public's access to intellectual works] is restored in the Copyright Act."[5]

**B.** ***Legislative Proposals***

The only copyright legislation of note to be enacted in the 107th Congress was the **Small Webcaster Settlement Act of 2002**.[6] This legislation constituted Congressional intervention into the results of the procedure mandated in the DMCA for the compulsory license it created for non-interactive webcasting. The Copyright Arbitration Royalty Proceeding (CARP) set a rate of 0.07 cents per song, far lower than the 0.4 cents rate proposed by the Recording Industry Association of America (RIAA) but still substantially higher than the rate proposed by webcasting interests. In response to protests that the rate would bankrupt many webcasters, the Librarian of Congress rejected the CARP recommendation and cut the royalty rate in half. Yet small webcasters continued to argue that only an alternative, revenue-based rate would allow them to continue operating. House Judiciary Committee Chairman James Sensenbrenner introduced a bill to postpone imposition of the royalty rate for six months.

[5] Press Release, "Brownback Statement on Telecom Industry," January 15, 2003. Sen. Brownback has also stated that his Subcommittee will review alternative means of addressing digital piracy than the technology mandates sought by Hollywood. At the conclusion of the 107th Congress he placed a "hold" on the Small Webcaster Act over concerns that it could become a precedent for "gamesmanship of the judicial and regulatory process where copyright royalties are concerned" and that a RIAA-supported requirement for a Report to Congress on Webcaster business arrangements was "drafted in such a general manner that its effect is to fling the copyright royalty dragnet so far and so wide"; the hold was released to allow the bill to become law. But, at a January 30, 2003 Commerce Committee hearing on radio industry consolidation, he strongly criticized artist group support for that webcast license measure, charging, "The artist community was only too willing to mow down diversity in favor of their own financial self-interest."

[6] Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (codified as amended in scattered sections of 17 U.S.C.).

Opposition from music industry interests resulted in a House compromise that allowed small webcasters to pay an alternative, percentage-of-revenues royalty.

When this bill arrived in the Senate a "hold" was placed upon it, prompted by religious broadcasters, resulting in a final deal postponing the payment of royalties by non-profit and public entity webcasters, for the period covering October 1998 through May 2003, until June 2003. It also permits the RIAA-affiliated SoundExchange collection agency to negotiate alternative royalty payments with those entities as well as with small commercial webcasters, including rates based on a percentage of expenses or revenues; and authorizes SoundExchange to deduct certain administration and licensing costs prior to distributing collected revenues to rights holders.

Finally, the bill directs the Comptroller General to study the business arrangements between small webcasters and third parties and report its findings to Congress. Despite the length, expense, and controversy that accompanied the setting of this initial royalty rate, a new CARP process to set a rate going forward begins at the Copyright Office on March 5, 2003. So far, while both sides profess their desire to negotiate a reasonable compromise, there is no sign that webcasters and the recording industry will be able to reach agreement in this new round.

The only relevant bill introduced so far in this Congress is H.R. 107, the **Digital Media Consumers' Rights Act of 2003,**[7] introduced on January 7, 2003 by Representatives Rick Boucher (D-VA) and John Doolittle (R-CA). This bill, identical to a measure introduced in October 2002, is based on a belief that "the DMCA dramatically tilted the balance in the Copyright Act towards content protection and away from information availability" and is intended "to restore the historical balance in our copyright law." [8] This measure would, among other things, amend the anti-circumvention provisions of the DMCA to permit scientific research into technological protection measures and clarify that

[7] Digital Media Consumer's Rights Act, H.R. 107, 108th Cong. (2003).

[8] 149 Cong. Rec. H1-02 (daily ed. Jan, 7, 2003) (statement of Hon. Rick Boucher).

circumvention of technological protections is permitted to make "fair use" of a copyrighted work; require conspicuous notice to consumers that a Compact Disc (CD) is copy-protected; and writes the "Betamax standard"[9] into copyright law by clarifying that it is not a violation to manufacture, distribute or make non-infringing use of any hardware or software product capable of making significant non-infringing use of a copyrighted work. This proposal is strongly opposed by Hollywood interests but backed by a broad coalition of computer and telecommunications firms, library associations, and cyber-liberties and consumer organizations. It has been referred to both the Energy and Commerce and Judiciary Committees.

Relevant legislation introduced during the 107th Congress that is likely to be re-introduced this year includes (all bill numbers from 107th Congress):

- **Consumer Broadband and Digital Television Promotion Act**:[10] This measure, introduced by then-Senate Commerce Committee Chairman Ernest Hollings, is a top priority of the Motion Picture Association of America (MPAA). It would authorize the FCC to establish security system standards for all hardware and software capable of reproducing digital media if their manufacturers and copyright interests fail to reach agreement on such standards within one year after enactment. It also requires Internet service providers (ISPs) to store and transmit with integrity any such security measure used in conjunction with copyrighted material that passes through them.

  This proposal is strongly opposed by computer hardware and software and consumer electronics interests on the grounds that government should not impose any such standard on private parties, that such a standard will fail to be effective given rapid changes in technology, and that it will result in devices and software that cost consumers more but have reduced functionality.

[9] *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[10] Consumer Broadband and Digital Television Promotion Act, S. 2048, 107th Cong. (2001).

This proposal was never reported from the Commerce Committee despite its then-Chairman's authorship, and is not likely to fare better under Chairman McCain.

- **Anticounterfeiting Amendments of 2002**:[11] This measure from Sen. Joseph Biden would have amended Federal criminal law to prohibit trafficking in an illicit authorization feature affixed to or embedded in a sound recording, software, or a motion picture. It defined an "authentication feature" to include a hologram, watermark, certification, symbol, code, sequence of numbers or letters, or any other feature used to verify that the product is not counterfeit or infringing of copyright. Injured copyright owners would also have been authorized to bring civil actions to recover damages against providers of illicit authentication features. The bill was reported from the Senate Judiciary Committee but never received full Senate consideration, in part because opponents of the Hollings bill feared it could have been a vehicle for that measure, as well as concerns that it could be interpreted as creating a new criminal charge available against consumers who duplicate certain copyrighted materials.

- **P2P Piracy Prevention Act**:[12] This measure, introduced by Rep. Howard Berman (D-CA), would excuse a copyright owner from any criminal or civil liability for impairing the unauthorized distribution, display, performance or reproduction on a publicly accessible peer-to-peer (P2P) network, subject to giving prior notice to the Department of Justice (DOJ) of his intent to use certain impairment technologies and provided that actual out-of-pocket damages to any user of a P2P network or software does not exceed $50 per impairment.

The bill also authorizes an aggrieved computer owner to bring an

[11] Anticounterfeiting Amendments, S. 2395, 107th Cong. (2001).

[12] P2P Piracy Prevention Act, H.R. 5211, 107th Cong. (2001).

action for wrongful impairment against a copyright owner provided that prior notification of such intent is provided to the DOJ, which is given a limited amount of time to investigate the complaint. Both copyright owner notices to DOJ of intent to use impairment technologies, and the results of DOJ investigations of allegations of unlawful impairment actions made by aggrieved P2P users, would have been exempt from public disclosure under the Freedom of Information Act (FOIA).

This bill was referred to the Judiciary Committee but no further action was taken. It was strongly critiqued by a variety of groups for undermining network and computer security by potentially providing millions of entities with an overly broad and vaguely worded loophole by which they might engage in "hacking" activities that could cause substantial economic damage. Staff for Rep. Berman has indicated that the bill is being revised to respond to certain criticisms but have not provided a target date for re-introduction.[13]

- **Digital Choice and Freedom Act:**[14] Rep. Zoe Lofgren introduced this measure, which is similar to, but more narrowly drawn than, the Boucher bill,[15] and is supported by many of the same business and public interests; it was referred solely to the Judiciary Committee. It would, among other things, allow

[13] Jon Healey, *Rep. Berman May not Retrieve Internet Piracy Bill*, L.A. TIMES, Feb. 21, 2003, at C3. Rep. Berman recently indicated that he might not re-introduce the measure due to lack of entertainment industry support, stating, "And if they're not for it, where am I going? It still may be worth doing but, realistically, a bill like this isn't going to zip through Congress." The RIAA's current position, as expressed in their recent agreement with the BSA and CSPP, is to withhold support from new copyright legislation. And the MPAA and its constituent movie studio members view the bill as unnecessary (because they contend that they do not engage in actions against P2P networks and users that violate federal or state law) and as creating worrisome new potential liabilities for copyright owners who engage in impermissible activities.

[14] Digital Choice and Freedom Act, H.R. 5522, 107th Cong. (2001).

[15] The Music Online Competition Act, H.R. 2724, 107th Cong. (2001).

consumers to make back up copies of digital copyrighted works and to circumvent access control technologies in order to make "fair use" of a work; explicitly extend the "first sale doctrine" to digital works; and bar the enforcement of any terms of a "shrink-wrap license" accompanying a digital copyrighted work which reduce consumer rights under the law.

In addition to these measures, House Energy and Commerce Chairman "Billy" Tauzin circulated a draft measure in September 2002 that would have mandated a "broadcast flag" standard for digital television. The proposal was prompted by frustration over the deadlock in private sector negotiations between Hollywood and consumer electronics interests on appropriate technological measures for protecting digital broadcast content. The FCC has indicated that it might seek to impose such a standard by regulation, but electronics manufacturers have already publicly questioned the Commission's legal authority to take such a step and have vowed to sue to prevent its implementation.

## III. INTEREST GROUP MANEUVERS

There have been several recent developments of note concerning major interest groups active in the copyright debate. They include:

- On January 14, 2003 the RIAA, Business Software Alliance (BSA), and Computer Systems Policy Project (CSPP) announced that they had jointly adopted seven principles for resolving digital content issues. These include opposition to legislation that would limit the effectiveness or use of digital rights management (DRM) technologies; tougher copyright law enforcement; support for voluntary technical measures to limit illegal distribution combined with opposition to government technology mandates; and support for technical "self-help" measures against P2P networks so long as they are reasonable, not destructive to networks or individual computers, and respectful of privacy and other legal rights.

Since the announcement, the RIAA has interpreted the Boucher bill to be in violation of these principles, but the CSPP declined to make judgment on that issue. Other technology groups such as the Consumer Electronics Association (CEA) and the Computer and Communications Industry Association (CCIA) continue to support the Boucher bill,[16] while the MPAA reasserted its support for technology mandates such as the Hollings bill[17] or FCC regulation mandating a broadcast flag.

- On January 23, 2003 a new organization, the Alliance for Digital Progress (ADP), announced its formation to oppose the Hollings bill[18]. The group, headed by a former senior aide in the Reagan and first Bush administrations, includes the American Electronics Association (AEA), BSA, Digital Media Association (DiMA), Information Technology Association of America (ITAA), National Association of Manufacturers (NAM), and Semiconductor Industry Association (SIA) as members, along with individual technology companies and several conservative think tanks and public interest organizations.

- On February 12, 2003 technology companies and the MPAA held the first meeting of the Analog Reconversion Discussion Group (ARDG), an offshoot of the Copy Protection Technical Working Group (CPTWG) that set standards for the DVD. The aim of the group is to discuss technologies that could prevent the re-digitization of content captured through an electronic device's analog output. While the participating technology groups have agreed to address Hollywood's priority goal of closing the "analog hole", they are opposed to using digital watermarks as a solution and are leery that any agreement reached by ARDG could

[16] *Id.*

[17] *Supra* note 10.

[18] *Id.*

become the basis for a government technology mandate.

- The CEA and National Cable and Telecommunications Association (NCTA) recently reached agreement on technology that would permit "plug and play" compatibility between digital TVs and cable systems. CEA announced that, if the FCC were to adopt the agreement, it would consider dropping its lawsuit challenging the agency's mandate that all TVs contain digital tuners by 2007 (because the plug and play equipment could function as such a tuner for a small additional cost). However, the two largest direct-broadcast satellite companies – EchoStar and DirectTV – are expected to oppose FCC adoption because the deal includes a ban on selectable output controls that allow content providers to remotely disable digital TV sets. Meanwhile, the MPAA has not yet taken a position on the deal.

## IV. RELATED LITIGATION

While Congress and the regulators continue to be stymied on these matters, several lawsuits of note continue their way through the judicial system and may well have eventual repercussions on Capitol Hill:

- **Eldred v. Ashcroft**:[19] In a 7-2 decision, the Supreme Court on January 15, 2003 upheld the Sonny Bono Copyright Term Extension Act.[20] That 1998 measure extended the term of both existing and future copyrights by twenty years. While indicating considerable unease over Congress' policy decision, the Court nevertheless held that the Act did not violate the Constitutional requirement that copyrights be for "limited terms". Critics of the Act argued that it effectively set the stage for perpetual copyright terms, as there would be nothing to prevent Congress from again extending terms for additional periods in the future and thereby

[19] *Eldred v. Ashcroft*, 123 U.S. 769 (2003).

[20] 17 U.S.C.S. § 101.

keep works from ever entering the public domain. The Court decision prompted calls for review of the Act, focusing on ways to make works that were not being commercially exploited available to the public.

- **MGM v. Grokster**:[21] In this Ninth Circuit case, currently being heard in Federal District Court in Los Angeles, record and movie industry plaintiffs are suing a number of distributors of second-generation P2P software. Plaintiffs argue that the defendants are guilty of vicarious and contributory copyright infringement as was held in the Napster case. Defendants argue that the Napster court did not find P2P to be illegal per se, but held against that particular company because of its actual knowledge of what copyrighted works were being shared over its network and its control over the central server that facilitated that activity. Their software, to the contrary, connects end point users without any intervening action or monitoring by a central server, and they argue that they should therefore bear no more liability than providers of other types of software – such as e-mail and instant messaging applications – that can facilitate the transmittal of copyrighted works.

  They further contend that their P2P software is capable of substantial non-infringing uses and is thereby sheltered by the Supreme Court's "Betamax standard"[22] for determining whether new technologies can be held liable for facilitating copyright infringement. On January 10, 2003 the Court held that Vanuatu-registered and Australian-based defendant Sharman Networks, owner of the popular Kazaa.com website, was subject to its jurisdiction despite its lack of employees or facilities in

[21] *MGM v. Grokster*, No. 01 08541; consolidated with No. 01 09923 (C.D. Cal. filed Oct. 22, 2001).
[22] *Sony Corp. of Am.*, 464 U.S. at 417.

California. This decision is at odds with the November 2002 decision of the California Supreme Court in *DVD Copy Control Association v. Pavlovich*,[23] where jurisdiction was denied in regard to a Texas resident who had made software capable of breaking DVD encryption available at his website because he had not targeted California for its distribution.[24] Sharman vowed to appeal the jurisdiction decision.

In addition, on January 28, 2003 Sharman filed a counterclaim alleging that the plaintiffs had violated the antitrust laws and engaged in misuse of copyright. If Sharman is victorious in its counterclaim, plaintiffs would be prevented from enforcing their copyrights. If plaintiffs prevail against Sharman they will likely have to seek enforcement of the U.S. judgment in one or more foreign jurisdictions, and such enforcement is not assured; for example, in 2002 the Amsterdam Court of Appeals held that distribution of the Kazaa software did not create copyright liability, and several U.S. courts have refused to uphold foreign judgments against U.S. residents for Internet activities.

- **RIAA v. Verizon**:[25] On January 21, 2003 the U.S. District Court for the District of Columbia ruled that Section 512(h) of the DMCA required Verizon to comply with a subpoena demanding that it reveal the identity of a user of its Internet services who the RIAA alleged had made about 600 copyrighted song files

[23] *Pavlovich v. Superior Court*, 29 Cal. 4th 262 (2002); *DVD Copy Control Association v. Pavlovich*, S. 100609, January 3, 2003. On January 3, 2003, Supreme Court Justice O'Connor lifted the stay she ordered on December 26, 2002 and upheld the California Supreme Court decision that Pavlovich (a Texas resident who does not do business in California) cannot be forced to stand trail in that state for publishing DVD descrambling source code.

[24] *Id.*

[25] *Recording Indus. Ass'n of Am. v. Verizon Internet Servs.*, 240 F. Supp.2d 24 (11th Cir. 2003).

available to other users of Kazaa P2P software. Section 512(h) provides a means by which a copyright holder can obtain a subpoena simply by filing infringement allegations with the clerk of the court. Verizon contended that this expedited procedure was only available where infringing material was stored on its servers, and that the RIAA should proceed by filing a "John Doe" subpoena request for review by a judge. However, the Court ruled that this expedited process was available against any subscriber connected to an Internet Service Provider (ISP), raising the prospect that major copyright holders using automated "bots" that seek out the Internet Protocol (IP) addresses of P2P software users could deluge ISPs with hundreds or even thousands of identification subpoenas.

This has raised concerns among ISPs regarding administrative costs and customer relations, as well as general privacy concerns. Verizon has appealed the Court's ruling and has asked that the order to reveal the subscriber's identity be stayed pending its outcome. Regardless of the outcome of the case, Verizon and other telecommunications firms and ISPs may well seek Congressional clarification of the scope of the Section 512(h) subpoena power.

- **Lexmark International v. Static Control Components Inc.:**[26] This potentially important case was filed in the Eastern District of Kentucky on December 30, 2002. The plaintiff, a manufacturer of printer ink cartridges, charges that a competitor's reverse engineering of copyrighted software that enables communication between the printer and cartridge is a violation of the DMCA's anti-circumvention provision. The case is similar to *Chamberlain Group v. Skylink Technologies*,[27] filed in the Northern District of

[26] *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, No. 02-571, 2003 U.S. Dist. LEXIS 3734 (February 27, 2003).

[27] *Chamberlain Group v. Skylink Technologies*, Civ. No. 02-C-6376 (N.D. Ill. filed Sept. 6,

Illinois last September. There, plaintiff manufacturer of garage door openers is suing a rival producer of remote control devices under the DMCA for circumventing software controlling the operation of the door openers.

While Congress only intended to protect non-functional content under the DMCA, plaintiffs' successful reliance on its literal language could have profound results. A wide array of manufacturers, such as automakers, could use copyrighted software to prevent the utilization of competitive aftermarket parts by their customers, and such a result could well prompt Congressional revision of the anti-circumvention clause.

## V. ADDITIONAL FACTORS

Aside from pending legislation and ongoing litigation, a number of other factors may affect the continuing debate over digital copyright policy. They include:

- *International harmonization*: One of the content industry's major claims in pushing through the Term Extension Act[28] and the DMCA was that these changes in copyright law were required to harmonize U.S. laws with those of the European Union (EU). However, the EU declined to extend copyright terms and, as a result, many early 1950's sound recordings that remain subject to U.S. copyright protections are entering the public domain in the EU. Additionally, despite heavy entertainment industry lobbying the EU's proposed revision of copyright law rejects many of the DMCA's more controversial provisions, especially those that can be used to prosecute individuals using P2P software.

- *Privacy*: The RIAA and MPAA have sent letters to the top 1000

2002).

[28] 17 U.S.C.S. § 101.

U.S. corporations and to thousands of universities urging them to adopt computer network policies that discourage copyright infringement, and to require individuals connecting to such networks to use software that monitors their hard drives for infringing content. On November 6, 2002 the Electronic Privacy Information Center (EPIC) sent a response to academic institutions in which they were urged to reject such monitoring software as invasive of privacy and academic freedom.

- *Copying levies*: At the urging of copyright collection societies, proposals are pending in Canada and Germany to place levies on computers and storage devices for facilitating copyright infringement in order to compensate rights holders and authors. Discussion of similar compensation modes is increasing in the U.S. in tandem with proposals for a new compulsory license that legalizes and monetizes P2P file sharing and CD/DVD burning. However, such proposals are criticized by entertainment industry interests as legitimizing piracy, while some in the technology sector view them as an unwarranted "tax" on consumers.

- *Pornography*: The movie and the record industry have long faced periodic criticism from Congress over violent or suggestive content. P2P software may now face its own critique for facilitating the sharing of pornographic images and video clips, including some that portray minors. The House Government Reform Committee is updating a 2001 report that looked at such activity on Napster, and plans a Spring 2003 hearing on this subject.

- *CARP Costs*: The CARP procedure that resulted in the controversial royalty rate for non-interactive webcasting reportedly consumed $25 million in attorney and expert witness fees to produce $15 million in initial revenues. Reform of, or an alternative to, the CARP process is desired by many parties, and it is likely that Congress will consider ways to alter the setting of

royalties under existing and future compulsory licenses.

## VI. CONCLUSION

Moore's Law,[29] which predicts a doubling of computing power every 18 months, will continue to mount an escalating challenge to the relevancy and enforceability of copyright law. Digital technology now allows for the reproduction and distribution of an infinite number of perfect copies of a digital work at a marginal cost approaching zero. It is extremely difficult to produce digital works meant to be marketed to broad audiences that include effective technological protections. While the record industry has been most directly affected by CD burning and file-sharing to date, no third party study has yet established a conclusive link between these activities and declining record sales. Indeed, some studies have found that file-sharing promotes CD sales on a net basis, and record industry critics have ascribed its problems to such factors as consolidation of the radio broadcast industry, inflexible and elevated product pricing,[30] a shift in consumer preferences toward audiovisual media,[31] and licensing problems (especially with music publishers) that prevent the offering of broad online music services.

Should policymakers conclude that traditional approaches cannot be effectively enforced in the digital realm, they may well seek alternative methods that fulfill the ends of copyright law – promotion of science and the useful arts through the provision of incentive to creators – while conceding that control over unauthorized copying is unlikely to be restored to the degree that existed for

[29] Moore's Law, *available at* http://www.webopedia.com/TERM/M/Moores_Law.html.

[30] Some observers have noted that some movie DVDs are now priced lower than the soundtrack CD for same film.

[31] Although U.S. CD sales declined in 2002, sales of DVDs nearly doubled.

analog media.